

***DISTRICT OF MAINE***

***Civil No. 99-384-P-C***

<sup>1</sup> During a June 2, 2000 conference with counsel the parties stipulated to the dismissal, without prejudice, of Hess's ERISA claim (Third Cause of Action) against Allstate only. Report of Hearing and Order re: Discovery Dispute (Docket No. 13) at 2. Allstate accordingly moves for summary judgment as to the remaining three counts of the Complaint. Allstate Motion at 1.

moves for summary judgment on all counts against MetLife. Plaintiff Kenneth Hess' Memorandum in Opposition to Defendant Metropolitan Life Insurance Co.'s Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment ("MetLife Opposition") (Docket No. 18). For the reasons that follow, I recommend that the motions of Allstate and MetLife be granted and that of Hess denied.

### **I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). To the extent that parties cross-move for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a

matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

## **II. Factual Context**

Hess was employed by Allstate as a Life Specialist from 1992 until October 1996. Defendant Allstate Insurance Company's Statement of Undisputed Material Facts ("Allstate SMF") (Docket No. 15) ¶ 1; Plaintiff's Response to Defendant Allstate Insurance Company's Statement of Undisputed Material Facts, etc. ("Response to Allstate SMF") (Docket No. 22) ¶ 1. Hess, like all new Allstate employees, was afforded an opportunity to enroll in a variety of employee benefit plans, including long-term disability ("LTD") insurance through MetLife. Allstate SMF ¶ 5; Response to Allstate SMF ¶ 5. He did indeed elect coverage under the Allstate Long Term Disability Insurance Plan (the "Plan"). Allstate SMF ¶ 6; Response to Allstate SMF ¶ 6.

To receive LTD pay under the Plan a person must be "Totally Disabled" as a result of the same "Sickness or Injury" for a 140-day waiting period and continue to be "Totally Disabled" thereafter. Allstate SMF ¶ 9; Response to Allstate SMF ¶ 9. The Plan defines "Totally Disabled" or "Total Disability" to mean that as a result of Sickness or Injury:

you are unable to perform the material duties of your occupation with your Employer during the Waiting Period and during the next 24 months;

thereafter, you must be totally incapable due to Sickness or Injury of performing the material duties of any gainful occupation for which you are reasonably fit based on training, education or experience.

Allstate SMF ¶ 10; Response to Allstate SMF ¶ 10. The term "Sickness" encompasses Mental or Nervous Disorders, which are defined as "a mental or emotional disease or disorder of any kind, including but not limited to neurosis, psychoneurosis, psychopathy and psychosis." Statement of Undisputed Facts in Support of MetLife's Motion for Summary Judgment ("MetLife SMF") (Docket

No. 10) ¶ 8; Plaintiff's Statement of Material Facts in Support of His Objection to Defendants' Motions for Summary Judgment, etc. ("Response to MetLife SMF") (Docket No. 19) ¶ 8.

The Plan contains certain limitations and exclusions, including a twenty-four month limitation on the duration of benefits for a disability due to a "Mental or Nervous Disorder." MetLife SMF ¶ 9; Response to MetLife SMF ¶ 9. The twenty-four month limitation does not apply to benefits for physical disabilities, which run until an eligible employee reaches age 65. Allstate SMF ¶ 11; Response to Allstate SMF ¶ 11.

The Plan also provides in relevant part:

#### **Plan Administration**

The Plan is insured by Metropolitan Life Insurance Company (MetLife). MetLife, as the claims review fiduciary, administers payment of claims in accordance with the Plan. The Allstate Group Long Term Disability Insurance Plan is administered by a Plan Administrator who is appointed by Allstate Insurance Company. The Plan Administrator and MetLife, as the claims review fiduciary, have the authority to determine all questions arising under the provisions of the Plan, including the power to determine the rights and eligibility of participants or any other persons, and to remedy ambiguities, inconsistencies or omissions. The Plan Administrator shall have all the duties and responsibilities imposed upon a Plan Administrator by ERISA. MetLife shall also have the responsibility of fiduciary for the provision of full and fair review of denials pursuant to Section 503 of ERISA.

In carrying out their respective responsibilities under the Plan, the Plan Administrator and other Plan fiduciaries shall have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan services in accordance with the terms of the Plan. Any interpretation or determination made pursuant to such discretionary authority shall be given full force and effect, unless it can be shown that the interpretation or determination was arbitrary and capricious.

MetLife SMF ¶ 5; Response to MetLife SMF ¶ 5.

With respect to MetLife's review of denied claims, the Plan provides:

#### **Requesting A Review Of Claims Denied In Whole Or In Part**

In the event a claim has been denied in whole or in part, you or your beneficiary can request a review of your claim by MetLife.

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MetLife will re-evaluate all the information and you or your beneficiary will be informed of the decision in writing in a timely manner. In reviewing claims, MetLife has the discretionary authority to interpret and apply the terms of the Plan applicable to the administration of claims. All decisions of MetLife are final.

MetLife SMF ¶ 6; Response to MetLife SMF ¶ 6.

In October 1996 Hess became disabled and was no longer able to work.<sup>2</sup> Allstate SMF ¶ 2; Response to Allstate SMF ¶ 2. He applied for LTD pay pursuant to the Plan on February 19, 1997. Allstate SMF ¶ 13; Response to Allstate SMF ¶ 13. In his application he represented that he was unable to perform the “important duties” of his job or any “other job” on a regular basis and did not know when he would be able to do so. *Id.* In support of his claim, Hess provided MetLife with an attending-physician statement from his family physician, Thomas Mills, M.D., who diagnosed Hess with “depression/anxiety.” MetLife SMF ¶ 11; Response to MetLife SMF ¶ 11. Dr. Mills classified Hess’s problem as psychological, consisting of major depression, impulse control and anxiety features, and noted that bipolar disorder “is a consideration.” *Id.* Hess later provided reports from psychiatrist Thomas Lantos, M.D., and psychologist David Margolis, Ph.D., both of whom diagnosed Hess with bipolar disorder. MetLife SMF ¶ 12; Response to MetLife SMF ¶ 12.

On April 1, 1997 MetLife denied Hess’s application, advising him:

You are claiming disability based on conditions diagnosed as bipolar disorder, depression and anxiety. A review of the records indicates that you have no delusions or thought disorder. Your memory and calculation ability are in order and your abstract thinking is intact. It does not appear that your condition prevents you from performing the duties of your job. Therefore, we have no other choice but to disallow your claim for Long Term Disability.

Allstate SMF ¶ 15; Response to Allstate SMF ¶ 15. On April 3, 1997 Hess appealed this initial denial. Allstate SMF ¶ 16; Response to Allstate SMF ¶ 16. After having its own doctors review the

information Hess submitted, MetLife concluded that he was not “totally disabled” within the meaning of the Plan and upheld the denial. Allstate SMF ¶ 17; Response to Allstate SMF ¶ 17. An independent medical exam was performed by Dr. Carl Metzger, a psychiatrist, on May 29, 1997. MetLife SMF ¶ 13; Response to MetLife SMF ¶ 13. Dr. Metzger diagnosed Hess with major depression but concluded that he was not totally disabled. *Id.* Hess was briefly hospitalized in June 1997 with a diagnosis of major depression. MetLife SMF ¶ 14; Response to MetLife SMF ¶ 14. By letters dated June 23 and 24, 1997 MetLife approved Hess’s claim for benefits subject to the mental/nervous disorder limitation provision. MetLife SMF ¶ 15; Response to MetLife SMF ¶ 15.

Effective February 18, 1997 MetLife paid Hess disability benefits under the Plan for a twenty-four-month period ending February 17, 1999. MetLife SMF ¶¶ 16-17; Response to MetLife SMF ¶¶ 16-17.

On December 19, 1998 Hess sought classification by MetLife of his bipolar disorder as a physical disability, which would extend LTD benefits beyond the twenty-four month period. Allstate SMF ¶ 21; Response to Allstate SMF ¶ 21. By letter dated January 4, 1999 MetLife requested that Hess submit medical evidence supporting his contentions. MetLife SMF ¶ 19; Response to MetLife SMF ¶ 19.

By letter dated January 14, 1999 MetLife informed Hess:

[T]he effective date on which your benefits started was February 18, 1997 and your 24 months of LTD benefits end on February 17, 1999. In reviewing the medical [information] in your file, we verified that your condition is purely psychiatric in nature and you are not presently hospitalized for this condition. Your Plan does not permit us to consider your disorder as a basis for continuing disability. Therefore, your long term disability benefits will terminate effective February 17, 1999.

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<sup>2</sup> Hess received eight weeks of short-term disability benefits and then was granted a two-year leave of absence. Allstate SMF ¶¶ 3-4; Response to Allstate SMF ¶¶ 3-4. Upon the expiration of his leave of absence on December 8, 1998, he was removed from Allstate’s payroll. Allstate SMF ¶ 4; Response to Allstate SMF ¶ 4.

Response to MetLife SMF ¶ 17; Reply Statement of Material Facts in Support of MetLife’s Motion for Summary Judgment, etc. (“MetLife Reply SMF”) (Docket No. 26) at 2.<sup>3</sup>

On January 29, 1999, through an attorney, Hess appealed MetLife’s denial of his claim. Allstate SMF ¶ 23; Response to Allstate SMF ¶ 23. In that letter Hess’s attorney complained *inter alia*:

In your January 4th letter you say MetLife will allow [Hess] thirty (30) days to submit evidence in support of his claim to continue benefits. In reliance on your representation, Mr. Hess set about getting this evidence from his doctors. Then, on the 14th, a mere ten (10) days later, without giving him the chance to submit such evidence, you denied him this opportunity by informing him that his benefits would end.

Letter dated January 29, 1999 from Daniel W. Bates to Ms. Kimberly Switzer, attached as Exh. B to Marchese Aff., at CL088.

In support of his contention that bipolar disorder is “organic” and therefore not mental, Hess provided MetLife a January 13, 1999 letter from Dr. Margolis, a January 12, 1999 letter from psychiatrist Benjamin Grasso, M.D., and a copy of an affidavit submitted by John Rush, M.D., in another case, *Attar v. UNUM*. MetLife SMF ¶ 21; Response to MetLife SMF ¶ 21. Dr. Margolis’s letter of January 13, 1999 stated:

I have been informed by Mr. Hess that MET Disability is denying his claim on the basis that Bipolar disorder is not an organic disorder. Assuming that Mr. Hess is reporting MET’s position accurately, you should be aware that MET’s assertion is in direct opposition to any instructional training I have received regarding this disorder. It is my understanding that bipolar disorder is commonly held by both the psychiatric as well as the psychological professional communities to be an organic disorder. In

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<sup>3</sup> MetLife characterizes this letter as simply a “final pay” letter that did not reference Hess’s appeal of MetLife’s prospective termination of his benefits nor state that it represented MetLife’s final decision, instead advising that Hess was entitled to seek review of termination of his benefits. See MetLife Reply SMF ¶ 20; Memorandum dated January 14, 1999, attached as Exh. B to Affidavit of Sal Marchese (“Marchese Aff.”) (Docket No. 11), at CL013 (“mailed final pay ltr”); Letter dated January 14, 1999 from Kimberly Switzer to Kenneth Hess, attached as Exh. B to Marchese Aff., at CL141-42 (“This letter is in reference to your claim for Long Term Disability Benefits under the Allstate Insurance Company Employee Benefit Plan. . . . In the event the claim has been denied, in whole or in part, you may request a review of your claim in writing. . . . MetLife will evaluate all the information and advise you of our determination in a timely manner.”).

my opinion, this is an indefensible position on the part of MET and I would urge you to reconsider your ruling.

MetLife SMF ¶ 22; Response to MetLife SMF ¶ 22. Dr. Grasso stated in his letter of January 12, 1999:

Kenneth Hess remains under my professional care. His primary diagnosis is Bipolar Type I Disorder. I am convinced that his disorder is as much a medical disorder as is Insulin Dependent Diabetes Mellitus. Both have a demonstrable physiologic basis, a predictable pattern of genetic inheritance, a lifelong course, the need for lifelong medication management, a pronounced effect on quality of life, and usually a progressively deteriorating course. One of the few differences is that the primary organ affected in Bipolar Disorder is the brain, not the pancreas. To state that Bipolar Disorder—one of the seven diagnoses for which parity with other disorders more typically considered “medical” is mandated, is not a medical disorder is to submit to an irrational bias towards disorders affecting one organ system versus another.

Bipolar Disorder is a medical disorder of the brain with behavioral symptoms.

Please consider the above in rendering a decision on Mr. Hess’s eligibility for continuation of insurance coverage based upon which his primary illness is medical.

MetLife SMF ¶ 23; Response to MetLife SMF ¶ 23.

The unsigned affidavit and attached report by Dr. Rush regarding the plaintiff in the case of *Attar v. UNUM* indicated that he was of the opinion that bipolar disorder is biological in nature. MetLife SMF ¶ 24; Response to MetLife SMF ¶ 24. Dr. Rush served as chair of the Diagnostic and Statistical Manual IV (“DSM-IV”) work group on mood disorders, which wrote that section of the DSM-IV, including all sections pertaining to bipolar and related disorders. Response to MetLife SMF ¶ 24; MetLife Reply SMF at 2-3.<sup>4</sup> Dr. Rush stated in a letter dated October 17, 1996, attached to his affidavit, that bipolar syndromes, schizophrenia and obsessive compulsive disorder have a recognized biological basis and thereby they should not be defined as “mental, psychological, or nervous”

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<sup>4</sup> DSM-IV is the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. MetLife SMF ¶ 26; Response to MetLife SMF ¶ 26. DSM-I, DSM-II and DSM-III are earlier versions of the manual. *Id.*



conditions. *Id.* Dr. Rush further stated, “Terms such [as] ‘emotional,’ ‘nervous,’ or ‘mental’ disorders or diseases are used as if the meaning was intuitively obvious. It is not. . . . The terms ‘mental illness’ and ‘mental disease or disorder’ are equally ambiguous and antiquated and lack specific meaning in the medical and psychiatric community.” *Id.*

MetLife referred Hess’s information to its psychiatric consultant Ernest Gosline, M.D., who provided the following report dated February 11, 1999<sup>5</sup>:

There is a considerable amount of documentation in this case from a wide variety of sources, including persons in the field of psychiatry who have taken a position that bipolar disorder is an organic disorder and should be dealt with in this regard. This is a controversial issue and has not been settled as yet. The question of organicity and heredity and bipolar disorder is a matter that is being handled in research, it is being handled in committees and there is no basic consensus that this is either true or false.

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In conclusion, in my opinion this disorder is listed and has been listed without exception as a psychiatric disorder in DSM I, II, III and presently in IV. It is also listed in the International Classification of Diseases as a psychiatric disorder.

MetLife SMF ¶ 25; Response to MetLife SMF ¶ 25.

MetLife also sought the opinion of its associate medical director, board-certified psychiatrist Marie-Claude Rigaud, M.D., based on the materials Hess submitted. MetLife SMF ¶ 27; Response to MetLife SMF ¶ 27. MetLife wrote Dr. Rigaud:

This is a request for your professional opinion.

The claimant received LTD benefits from February 19, 1997 through February 17, 1999 based on the diagnosis of bipolar disorder and depression. The claim was terminated based on the 24 month mental and nervous disorder plan provision.

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<sup>5</sup> An internal MetLife memorandum dated February 4, 1999 stated: “Appeal referral – we denied benefits due to 2 yr psych limit based on diagnoses of bipolar disorder severe with depression – this is a psych diagnosis not medical as far as MetLife has been handling all claims to date – EE is disputing whether this should be handled as medical and not psych – however since there is no new medical to dispute EEs condition not being bipolar disorder and no new medical condition to review this is still considered to be denied correctly under the psych plan provision. Please see me to discuss if you disagree—ASmith” Memorandum dated February 4, 1999, attached as Exh. B to Marchese Aff., at CL086.

On January 29, 1999 we received a letter from Daniel Bates at the Maine's [sic] Federally Funded Protection and Advocacy Agency. Mr. Bates indicated that we have no factual basis for characterizing Mr. Hess' Bipolar as "mental" in order to deny his benefits, and no legal basis for discriminating against Mr. Hess. Mr. Bates also submitted medical information indicating that bipolar disorders are organic disorders[,] not purely psychiatric disorders.

Dr. Gosline reviewed the file and suggested we forward the file to you. Please see Dr. Gosline's February 11, 1999 report.

We are forwarding a copy of the file and the plan for your review. Please comment on whether bipolar disorders should be considered purely psychiatric disorders in regards to the mental & nervous plan provision.

If you agree with Dr. Gosline that bipolar disorders should be listed as purely psychiatric, please advise of any special wording that should be used in addressing this issue.

Letter dated February 19, 1999 from Sal Marchese to Dr. Marie-Claude Rigaud, attached as Exh. B to Marchese Aff., at CL079. By memorandum dated March 1, 1999 Dr. Rigaud informed Marchese, "Sal, although I already have an opinion on this matter, I decided to conduct a literature search so that opinion rendered will be supported by the scientific literature and [be] professionally and legally valid. This will also give us more solid wording to use in addressing the issue." Response to MetLife SMF ¶ 28; MetLife Reply SMF at 3-4.

In her report of March 22, 1999 Dr. Rigaud noted that Dr. Rush's report from the *Attar v. UNUM* case was not applicable to Hess's claim, as that case involved an individual who sustained a head trauma from an accident with the possibility of resulting central nervous system injuries. MetLife SMF ¶ 28; Response to MetLife SMF ¶ 28.<sup>6</sup> Dr. Rigaud further stated:

1) DEFINITION OF MENTAL DISORDERS IN DSMIV. While they deplored having to select the term "mental" as opposed to "physical", in light of the

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<sup>6</sup> Dr. Rigaud submitted her March 22, 1999 opinion with a cover memorandum stating, "It is, most likely, lengthier and more elaborate than what you asked for or expected, but may be helpful later on for legal use if needed." Response to MetLife SMF ¶ 28; MetLife Reply SMF at 3-4.

mind/body connection, because there is much “physical[”] in [ ]mental disorder and much “mental” in physical disorder, the authors of DSMIV did adopt a definition for mental disorder.

2) BIPOLAR DISORDER IS INCLUDED, ALONG WITH OTHER MOOD DISORDERS AS A MENTAL DISORDER IN DSMIV. Furthermore, one of the diagnostic criteria for mood disorder is that “mood symptoms are not due to the direct effects of a substance or general medical condition.” With this in mind and, given the current state of scientific knowledge, a claim for organic versus mental condition for a mood disorder would fall under a different diagnosis, such as Mood Disorder due to a general medical condition. This may have been the case in ATTAR v. UNUM INSURANCE.

3) THERE IS NO AGREED UPON EVIDENCE AS TO BIPOLAR DISORDER BEING PURELY “ORGANIC” AND NOT “MENTAL.” Researchers have reported the existence of “causable” or “secondary” mania as opposed to “idiopathic.” But in most of these cases, the causes, physical illness such as neoplasia or infections or drugs, are evident or there are other associated findings, such as neurological abnormalities along with the mood disorder. Such is not the case in this claim.

4) It is documented that, in April 1997, Dr. Margolis attributed the claimant’s condition to a “cluster of stress related symptoms.” And to his “inability to cope with life stressors which he had previously been able to manage.” Such description clearly supports a psychiatric or mental condition. Dr. Margolis listed the following symptoms and behaviors.

- 1) Overreact to even minor emotional events
- 2) Often impossible to enter places which have crowds
- 3) Fear of answering phone and screening calls with answering machine.
- 4) Bouts of panic attacks to the point of fainting
- 5) Frequent bouts of rage, continual state of depression and fear.
- 6) Excessive anger
- 7) Decreased cognitive capacity, low frustration tolerance and lethargy with increased sleep in the afternoon.

Given these symptoms and behaviors, Dr. Margolis concluded that fear and agitation make it impossible for the claimant to function in a service related industry. It is interesting that in his most recent correspondence supporting the appeal, Dr. Margolis deviates from this theory to an “organic” one, without providing rationale to support such a switch.

5) THE POSSIBILITY THAT GENETIC FACTORS MAY BE PLAYING A ROLE IN PREDISPOSITION TO BIPOLAR AND OTHER MOOD DISORDERS DOES NOT VALIDATE AN “ORGANIC” BASIS FOR THESE CONDITIONS. The American Textbook of Psychiatry describes Bipolar Disorder as “mental disorder”

and indicate[s] that “several etiological hypothesis [sic], including studies using CT or MRI and functional imaging studies using SPECT or PET have thus far been inconclusive.” Other literature references consulted describe BPD as “a major psychiatric” disorder with well recognized genetic contribution to its etiology.[] Other references indicate that “most cases are functional in origin” and “the underlying etiology is still poorly understood, although a number of biochemical abnormalities have recently been identified and the evidence for a genetic role is strong.” A review of biological concepts by 3 authors concludes “Even assuming that we knew in which area of the brain to find a defect causing depression and mania, we have no way of directly measuring it.” They add that depression is an heterogeneous condition with no one single cause, although the “genetic predisposition to the development of certain types of affective disorders” is clear.

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[T]he present state of the art and knowledge in the field is that Bipolar Disorder is a mental disorder. This is the current accepted opinion, at this time, and until or unless further scientific studies incontestably prove otherwise. Although, associated clinical findings suggest that Mood Disorder or Bipolar due to physical/medical/organic causes might have been involved in the case of ATTAR v. UNUM Insurance, there is no evidence that the claimant named above showed evidence of any of these conditions. I[n] fact, Dr. Mills makes it clear that neurological, endocrine and other investigations have not identified an “organic” etiology.

MetLife SMF ¶ 28; Response to MetLife SMF ¶ 28. Dr. Rigaud, in discussing the opinion of Dr. Mills, referred to a letter of April 18, 1997 that Hess had previously submitted in support of his claim in which Dr. Mills stated: “The patient has been reluctant to accept that his symptoms are related to mental illness, but he has been assessed by specialists in endocrinology, neurology and cardiology. At this point in time, I am comfortable that his symptoms are not related to any physical illness.”

MetLife SMF ¶ 29; Response to MetLife SMF ¶ 29.

By letter dated March 31, 1999 MetLife informed Hess’s counsel:

We have completed the review of the termination of Mr. Hess’s Long Term Disability claim. For the reasons noted below, it is our determination that the termination of his claim was proper, therefore, we must uphold the denial.

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We have reviewed all the medical and vocational information in our possession with our medical staff.

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According to our medical staff bipolar disorder is listed and has been listed without exception as a psychiatric disorder in the DSM I, II, III and presently in IV. Bipolar disorder is also listed in the [I]nternational Classification of Diseases as a psychiatric disorder. The present state of the art and knowledge in the field is that bipolar disorder is a mental disorder. This is the current accepted opinion, at this time, and until or unless further scientific studies incontestably prove otherwise.

We have determined that the additional medical information submitted on appeal does not change our previous decision to terminate benefits.

This determination is the final decision on review and constitutes completion of the full and fair review required by the plan and federal law.

Letter dated March 31, 1999 from Sal Marchese to Daniel Bates, attached as Exh. B to Marchese Aff., at CL069-70.

On September 2, 1998 Hess filed a charge of discrimination with the Maine Human Rights Commission. Allstate SMF ¶ 26; Response to Allstate SMF ¶ 26. The charge was forwarded to the EEOC, which on October 13, 1999 issued Hess a notice of right to sue. Allstate SMF ¶ 27; Response to Allstate SMF ¶ 27. On December 27, 1999 the instant suit was filed. Complaint at 1.

### **III. Discussion**

#### **A. ADA Claims**

Hess in his First and Second Causes of Action alleges that MetLife and Allstate violated Titles I and III of the Americans with Disabilities Act of 1990 (the “ADA”) in imposing a twenty-four month limit on the duration of his benefits on the basis of classification of his illness as a “mental or nervous disorder” while permitting persons with illnesses deemed physical to receive benefits until at least age 65. Complaint at 1, ¶¶ 24-40.

MetLife and Allstate assail this contention primarily on the ground that courts (including most notably this court in a recent published opinion) have held virtually unanimously that such a durational

limit does not run afoul of the ADA. *See* Memorandum of Law in Support of Defendant Metropolitan Life Insurance Company’s Motion for Summary Judgment (“MetLife Memorandum”) (Docket No. 9) at 9-11; Allstate Motion at 4-6.<sup>7</sup>

Considering this precise issue in the context of claims under Titles I and III of the ADA, this court held:

According to appellate precedent and the relevant legislative history, there is simply no requirement under the ADA that insurance policies provide the same benefits to all categories of disabled people. The provision of a shorter benefits term to people suffering from a mental rather than a physical disability may be based on antiquated or ignorant beliefs, as Mr. Connors contends. However, this is an argument that is appropriately presented to the legislature.

*Connors v. Maine Med. Ctr.*, 42 F.Supp.2d 34, 55 (D. Me.), *reconsidered on other grounds*, 70 F.Supp.2d 40 (D. Me. 1999).

In reaching this conclusion, the court observed *inter alia* that three United States Circuit Courts of Appeals had ruled that a durational limitation on benefits for mental/nervous disorders did not violate the ADA. *Id.* at 52 (citing *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997); *EEOC v. CNA Ins. Cos.*, 96 F.3d 1039 (7th Cir. 1996)). Four others have since followed suit. *See EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000) (“Today we join six other Courts of Appeals in concluding that Title I of the ADA does not bar entities covered by the statute from offering different long-term disability benefits for mental and physical disabilities”; citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1116-18 (9th Cir. 2000), *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1101-02

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<sup>7</sup> I do not reach the alternative arguments of MetLife and Allstate that (i) the Plan falls within the ADA safe harbor, (ii) the First Cause of Action is time-barred, (iii) Hess is not a “qualified individual with a disability” for purposes of the First Cause of Action, and (iv) neither Allstate nor MetLife is a “public accommodation” for purposes of the Second Cause of Action. MetLife Memorandum at 11-15; Allstate Motion at 7-13.

(10th Cir. 1999) and *Lewis v. Kmart Corp.*, 180 F.3d 166, 170 (4th Cir. 1999), in addition to *Schering-Plough*, *Metropolitan Life* and *CNA*).

Nothing that Hess cites shakes confidence in the correctness of this outcome. *See* MetLife Opposition at 3-5; Plaintiff Kenneth Hess' Memorandum in Opposition to Defendant Allstate Insurance Co.'s Motion for Partial Summary Judgment ("Allstate Opposition") (Docket No. 21) at 2-5.

Two of the cited cases shed no perceptible light on the issue. *See Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 21 (1st Cir. 1994) (holding that district court wrongly dismissed complaint without providing notice of intended dismissal, misinterpreted term "employer" under Title I of ADA and erred in concluding that defendants were not "public accommodations" under Title III of ADA); *Doukas v. Metropolitan Life Ins. Co.*, 950 F.Supp. 422, 424, 427, 432 (D.N.H. 1996) (holding Title III of ADA applicable to denial of insurance based on applicant's mental illness; denying summary judgment on basis of existence of genuine issues of material fact with respect to safe-harbor defense). A third case, *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), was factored into this court's analysis in *Connors*, 42 F.Supp.2d at 55 n.9. A fourth, *Olmstead v. L.C.*, 119 S. Ct. 2176 (1999), in which the Supreme Court held that the ADA in certain situations requires the placement of persons with mental disabilities in community settings rather than in institutions, *id.* at 2181, merely reiterates the holding of *O'Connor*, *id.* at 2186 n.10. Finally, *Boots v. Northwestern Mut. Life Ins. Co.*, 77 F.Supp.2d 211 (D.N.H. 1999), the only case cited by Hess holding that a durational limitation on benefits for mental/nervous conditions violates the ADA, *id.* at 216-20, is neither controlling nor persuasive authority, relying on an interpretation of precedents and legislative history at odds with that embraced by this court in *Connors*. *Compare Boots*, 77 F.Supp.2d at 216-20, *with Connors*, 42 F.Supp.2d at 52-55.

Inasmuch as the limitation of Hess's LTD benefits on the basis of classification of his illness as a mental/nervous disorder does not as a matter of law violate Titles I or III of the ADA, MetLife and Allstate are entitled to summary judgment with respect to Hess's First and Second Causes of Action.

### **B. ERISA Claim**

Hess in his Third Cause of Action (dismissed as to Allstate) asserts that MetLife wrongfully denied benefits in contravention of the Employee Retirement Income and Security Act ("ERISA") by classifying his condition as a "mental or nervous disorder" when it is in fact physiological. Complaint at 1, ¶¶ 41-53.

A denial of ERISA-plan benefits "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Terry v. Bayer Corp.*, 145 F.3d 28, 35 (1st Cir. 1998) (citation and internal quotation marks omitted). If the administrator or fiduciary possesses the requisite discretion, "[n]ormally . . . its decision must be upheld unless arbitrary, capricious, or an abuse of discretion." *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 183 (1st Cir. 1998) (citations and internal quotation marks omitted). "This standard means that [the administrator's or fiduciary's] decision will be upheld if it was within [its] authority, reasoned, and supported by substantial evidence in the record. Substantial evidence, in turn, means evidence reasonably sufficient to support a conclusion. Sufficiency, of course does not disappear merely by reason of contradictory evidence." *Id.*, 144 F.3d at 184 (citations and internal quotation marks omitted).

Hess concedes that MetLife was vested with discretion to determine all questions arising under the Plan and to remedy ambiguities. MetLife Opposition at 14-15. He nonetheless seeks a more stringent standard of review on alternative grounds that (i) MetLife drafted the assertedly ambiguous



Plan language at issue, warranting application of the doctrine of *contra proferentem*, and (ii) MetLife had a conflict of interest meriting heightened scrutiny. *Id.* at 14-24.

The First Circuit does indeed follow the doctrine of *contra proferentem* in the context of *de novo* review of denials of ERISA plan benefits. *See, e.g., Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264, 268 & n.3 (1st Cir. 1994); *see also Dorsk v. Unum Life Ins. Cos. of Am.*, 8 F.Supp.2d 19, 21-23 (D. Me. 1998). However, caselaw cited by Hess suggests that only in a minority of cases has this doctrine been adopted in the context of deferential review. *See Lee v. Blue Cross/Blue Shield of Ala.*, 10 F.3d 1547, 1551 & n.3 (11th Cir. 1994). This is not particularly surprising. MetLife in this case possessed express discretionary authority to interpret the terms of the Plan and to remedy any ambiguities. In such a case, the concept of construing a rule against its drafter simply does not square with the premise of conducting a deferential review. *See, e.g., Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998) (rejecting contention that doctrine of *contra proferentem* should apply in deferential-review case; noting “[b]ecause our review in this case is deferential, we would accept any reasonable interpretation which AIG gives a plan term.”); *Cagle v. Bruner*, 112 F.3d 1510, 1519 (11th Cir.), *reh’g denied*, 124 F.3d 223 (11th Cir. 1997) (“The ‘reasonable interpretation’ factor and the arbitrary and capricious standard of review would have little meaning if ambiguous language in an ERISA plan were construed against the Fund.”).<sup>8</sup>

Hess next argues that MetLife made a preordained decision to deny him benefits, which he argues evinces a conflict of interest meriting heightened review. MetLife Opposition at 20-24. The First Circuit has held that a deferential review with “more bite” is warranted if a claimant can

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<sup>8</sup> Hess also argues that even if the court were not required to apply the doctrine of *contra proferentem*, MetLife was obligated to construe the Plan terms against itself in view of its dual role as both insurer and claims administrator. MetLife Opposition at 17-18. The key case on which Hess relies, *Luton v. Prudential Ins. Co. of Am.*, 88 F.Supp.2d 1364 (S.D. Fla. 2000), stands not for the proposition that such an insurer must construe ambiguous terms in a plan against itself but rather for the proposition that such an insurer suffers from a conflict of interest warranting heightened review by the court, *id.* at 1370. As discussed below, the First Circuit has (continued...)

demonstrate “improper motivation.” *Doyle*, 144 F.3d at 184. The inherent motivation of a payor who doubles as a claims administrator to avoid payment (thus preserving its coffers) is not enough. *Id.*; *see also Doe v. Travelers Ins. Co.*, 167 F.3d 53, 57 (1st Cir. 1999) (“*Doyle* stressed the benefit of a uniform test of discretion and concluded that the mere fact that an individual claim, if paid, would cost the decision maker something did not show that the decision was improperly motivated.”) (citation and internal quotation marks omitted).

As an initial matter, Hess’s argument seems to amount merely to a variation on the theme that a fiduciary/payor was motivated to avoid making a claims payment. *See* MetLife Opposition at 21 (“The decision was not based on substantial evidence, but rather on the business of limiting claims at any cost . . . .”). In any event, the record belies the contention that the decision regarding Hess’s benefits was in fact preordained.

Hess points to the fact that he received a rote January 14, 1999 denial-of-benefits letter before he even had a chance to submit evidence germane to his December 1998 request for reclassification of his disorder. *Id.* Bias in Hess’s view is further evidenced by an internal MetLife memorandum indicating, even after receipt of Hess’s medical evidence, that in the case of bipolar disorder “all claims to date” had been handled as “psych diagnosis not medical.” *Id.* at 22. MetLife contends that the January 14th letter was not a response to the premature December request for reclassification. Reply Memorandum of Law in Support of MetLife’s Motion for Summary Judgment, etc. (Docket No. 25) at 14. Even viewing the record on this point in the light most favorable to Hess, it is apparent from the face of the January 14th letter that it was not MetLife’s final decision. Hess subsequently submitted evidence that did indeed receive individualized attention from two MetLife physicians, Drs. Gosline and Rigaud. Hess protests that both Drs. Gosline and Rigaud, neither of whom was

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explicitly rejected the notion that wearing such dual hats is a type of conflict of interest meriting heightened review.

independent, were expected merely to submit advocacy briefs bolstering the preordained decision. MetLife Opposition at 22. However, MetLife sought Dr. Rigaud’s “professional opinion,” leaving the door open to the possibility that she might disagree with Dr. Gosline.

Hess fails to carry his burden of demonstrating the sort of “improper motivation” that would warrant heightened scrutiny in the context of deferential review.

This leaves the question whether, from the vantage of ordinary deferential review, MetLife’s reaffirmation of its classification of Hess’s bipolar disorder as “mental or nervous” was reasonable. The Plan defines a “mental or nervous disorder” as a “a mental or emotional disease or disorder of any kind, including but not limited to neurosis, psychoneurosis, psychopathy and psychosis.” The question raised is thus one of classification: Is bipolar disorder properly classed as “a mental or emotional disease or disorder of any kind”? The Plan is silent on the question of the mechanics by which such a determination is to be made, *e.g.*, whether by reference to listing in a manual such as DSM-IV, by etiology or by symptomology.

MetLife reaffirmed the classification of Hess’s bipolar disorder as “mental/nervous” primarily on the basis of its classification as a psychiatric disorder in both DSM and the International Classification of Diseases. This was both a reasonable interpretation of the Plan language and sufficient to dispose of the question before MetLife.<sup>9</sup> Even assuming *arguendo* that MetLife had a need to delve into disease etiology, it was presented with evidence (the Gosline and Rigaud opinions) from which it reasonably could have concluded that neither bipolar disorder in general nor Hess’s

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<sup>9</sup> Hess asserts that MetLife (including Drs. Gosline and Rigaud) never analyzed the relevant Plan language in considering his claim. MetLife Opposition at 13, 16, 21. However, Dr. Rigaud was advised, in a letter indicating that the Plan was enclosed, to “comment on whether bipolar disorders should be considered purely psychiatric disorders in regards to the mental & nervous plan provision.” The word “psychiatric” reasonably could be equated with “mental.” *See Webster’s Third New International Dictionary* 1411 (1981) (defining “mental” in relevant part as “of, relating to, or affected by mental deficiency or any of a variety of psychiatric disorders . . . .”

condition in particular had been conclusively shown to have an organic basis. *See Terry*, 145 F.3d at 41 (“That there were contradictory opinions before the Committee does not render the Committee’s decision arbitrary or capricious.”).

Inasmuch as MetLife’s reaffirmation of its denial of Hess’s benefits cannot be said to have been either arbitrary or capricious, MetLife is entitled to summary judgment with respect to Hess’s Third Cause of Action.

### **C. State-Law Claim**

In his Fourth Cause of Action Hess complains that MetLife and Allstate violated 24-A M.R.S.A. § 2159-A, a provision of Maine insurance law forbidding limitation of coverage on the basis that an insured person has a “mental handicap.” Complaint ¶¶ 54-57. Hess concedes that the statute at issue provides no right of action for a private citizen; however, he argues that the provision nonetheless renders the twenty-four-month limitation unenforceable against Hess. MetLife Opposition at 25-26; Allstate Opposition at 12-13. The conceded lack of a private right of action is dispositive of this claim, which has no bearing on either the ADA or ERISA claims elsewhere asserted. *See Connors v. Maine Med. Ctr.*, 70 F.3d 40, 43 (D. Me. 1999) (asserted violation of 24-A M.R.S.A. § 2159-A irrelevant to asserted ERISA violation). MetLife and Allstate accordingly are entitled to summary judgment with respect to the Fourth Cause of Action.

### **IV. Conclusion**

For the foregoing reasons, I recommend that the summary judgment motions of Allstate and MetLife be **GRANTED** and that of Hess **DENIED**.

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting*

***memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated this 2nd day of August, 2000.***

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***David M. Cohen***

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 99-CV-384

HESS v. ALLSTATE INSURANCE, et al  
Assigned to: JUDGE GENE CARTER  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None

Filed: 12/27/99  
Jury demand: Both  
Nature of Suit: 791  
Jurisdiction: Federal Question

Cause: 42:12101 American Disabilities Act

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